Case Comments

State v. Burkholder: Expansion of Individual Liberties Under the Ohio Constitution?

I. INTRODUCTION

In *State v. Burkholder*,[1] a case of first impression, the Ohio Supreme Court held that the exclusionary rule[2] was applicable in probation revocation proceedings. The court's holding relied on both the fourth amendment to the United States Constitution[3] and section 14, article I of the Ohio Constitution.[4] While not completely unprecedented, *Burkholder* is in opposition to the majority view[5] on the extent of federal constitutional protection against unreasonable searches and seizures. There is no doubt, however, that Ohio could rely on its own constitution to expand the application of the state's exclusionary rule to probation revocation proceedings.[6]

If the Ohio Supreme Court did rely independently on the state constitution, then review by the United States Supreme Court would be precluded;[7] thus, the exclusionary rule would still apply in Ohio even if the United States Supreme Court eventually decides that the fourth amendment does not require such protection. There remains some doubt, however, as to whether *Burkholder* is in fact based solely on the Ohio Constitution.[8] Furthermore, it remains unclear whether the Ohio Supreme Court intended to expand a probationer's state constitutional rights beyond those guaranteed by the fourth amendment.[9] Unfortunately, *Burkholder* raises more questions than it answers.

This Comment analyzes the *Burkholder* decision and its many unanswered questions. Section II addresses the exclusionary rule and its applicability in *Burkholder* under both federal and state constitutional guarantees. The recent trend toward reliance on state constitutions to expand individual liberties[10] is the subject of section III. Section IV focuses on the Ohio Supreme Court's reliance on the state constitution and specifically considers *Burkholder*'s reference to the state constitution. Finally, section V recognizes the unanswered questions raised by this case and suggests that the Ohio Supreme Court may be signaling a new approach that would provide greater protection for individual liberties under the Ohio Constitution.

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1. 12 Ohio St. 3d 205, 466 N.E.2d 176, *cert. denied*, 105 S. Ct. 545 (1984).
2. In general, the exclusionary rule provides that evidence seized in an unreasonable search and seizure is inadmissible in a criminal prosecution. *See also infra* notes 11–23 and accompanying text.
3. U.S. CONST. amend. IV.
4. OHIO CONST. art. I, § 14.
5. *See infra* notes 34–36 and accompanying text.
6. *See infra* notes 26–27 and accompanying text.
7. *See infra* notes 60–62 and accompanying text.
8. *See infra* notes 96–104 and accompanying text.
9. *Id.*
10. For purposes of this Comment, the term "individual liberties" encompasses both civil rights and defendants' rights.

II. THE EXCLUSIONARY RULE AND ITS APPLICATION IN *Burkholder*

A. *Federal and State Exclusionary Rules*

The fourth amendment to the United States Constitution protects persons within the United States from unreasonable searches and seizures, and guarantees that search warrants shall lawfully issue only if based on probable cause.[11] To enforce this prohibition against unreasonable searches and seizures, the Supreme Court held in *Weeks v. United States*[12] that evidence seized in violation of the fourth amendment was inadmissible in a federal prosecution.[13] The function of this exclusionary rule "is to deter—to compel respect for the constitutional guaranty in the only effectively available way—by removing the incentive to disregard it."[14] After the Supreme Court held that the fourth amendment is incorporated into the fourteenth amendment,[15] the exclusionary rule created by *Weeks* was applied directly to the states.[16] Thus, the Supreme Court held in *Mapp v. Ohio*[17] that "all evidence obtained by searches and seizures in violation of the Constitution is . . . inadmissible in a state court."[18]

In addition to the fourth amendment's protection, section 14, article I of the Ohio Constitution provides protection for the people as follows:

> The right of the people to be secure in their persons, houses, papers, and possessions, against unreasonable searches and seizures shall not be violated; and no warrant shall issue, but upon probable cause, supported by oath or affirmation, particularly describing the place to be searched and the person and things to be seized.[19]

Although similarities between the two constitutional guarantees cannot be denied, similarity of scope may not be inferred from similarity of text. As one commentator has noted, it is "no novel perception that different men may employ identical language yet intend vastly different meanings and consequences."[20]

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11. The fourth amendment specifically states that:

> The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

U.S. CONST. amend. IV. Not every warrantless search, however, violates the fourth amendment. Five basic exceptions to the warrant requirement have been judicially created: stop and frisk, Terry v. Ohio, 392 U.S. 1 (1968); incident to a lawful arrest, Michigan v. DeFillippo, 443 U.S. 31 (1979); consent, Schneckloth v. Bustamonte, 412 U.S. 218 (1973); hot pursuit, Warden v. Hayden, 387 U.S. 294 (1967); and exigent circumstances, United States v. Chadwick, 433 U.S. 1 (1977). The plain view doctrine, Coolidge v. New Hampshire, 403 U.S. 443, *reh'g denied*, 404 U.S. 874 (1971), permits the seizure of evidence in plain view during a lawful search based on another crime or purpose. This doctrine, therefore, is not an exception to the warrant requirement of the fourth amendment.

12. 232 U.S. 383 (1914).

13. *Id.*

14. Elkins v. United States, 364 U.S. 206, 217 (1960); *see also* United States v. Calandra, 414 U.S. 338 (1974).

15. Wolf v. Colorado, 338 U.S. 25 (1949).

16. Mapp v. Ohio, 367 U.S. 643 (1961).

17. *Id.*

18. *Id.* at 655.

19. OHIO CONST. art. I, § 14.

20. Falk, *The Supreme Court of California 1971–1972 Foreword The State Constitution: A More Than "Adequate" Nonfederal Ground*, 61 CALIF. L. REV. 273, 282 (1973).

Ohio's exclusionary rule is in fact not identical to the federal exclusionary rule because under Ohio law all evidence seized in an unreasonable search and seizure is not per se inadmissible.[21] In 1978 the Ohio Supreme Court succinctly stated its position as follows:

> With respect to Section 14, Article I of the Ohio Constitution, this court, at a time when the federal exclusionary rule set forth in *Weeks* . . . was not applicable to the states, held in *State v. Lindway*[22] . . . that evidence in a criminal case, even if obtained by unlawful search, was admissible if relevant and competent.[23]

Thus, a defendant in Ohio is entitled to the exclusion of some degree under both constitutions, although the scope of that exclusion need not be identical.

Mapp, and the supremacy clause,[24] guarantee that evidence must be exluded as a matter of federal law, once a violation of the fourth amendment has been established. Thus, there is a floor of minimal protection beneath which a state may not venture without violating the federal constitution. The federal exclusionary rule would, therefore, exclude evidence that might arguably be admissible in Ohio under the *Lindway* standard. Consequently, after *Mapp* applied the federal exclusionary rule to the states, the *Lindway* standard became inoperative in criminal proceedings.

The Ohio Supreme Court, however, has specifically noted that while the Ohio courts have "frequently applied the federal exclusionary rule, the non-exclusionary rule adopted in *Lindway* under the Ohio Constitution has never been overruled."[25] Thus, *Lindway*'s standard of admissibility must still be recognized as the test for exclusion of evidence under section 14, article I of the Ohio Constitution.

While the federal constitution undeniably provides a floor of minimal protection for individual liberties, it does not function as a ceiling on the amount of protection that a state may provide under its own law. The Supreme Court has specifically acknowledged that "a State is free *as a matter of its own law* to impose greater restrictions on police activity than those this Court holds to be necessary upon federal constitutional standards."[26] Evidence admissible under the federal constitution might not be admissible under the state constitution. In this same manner, a state might hold that its exclusionary rule applied to a criminal, or quasi-criminal proceeding, even if the federal exclusionary rule did not apply. One must remember, however, that "a State may not impose such greater restrictions as a matter of *federal constitutional law* . . . ,"[27] but only as a matter of state constitutional law. Because *Burkholder*

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21. State v. Lindway, 131 Ohio St. 166, 2 N.E.2d 490 (1936), *cert. denied* and *appeal dismissed*, 299 U.S. 506 (1936); *see also* State v. Williams, 6 Ohio St. 3d 281, 452 N.E.2d 1323 (1983), *cert. denied*, 464 U.S. 1020 (1983); State v. Bernius, 177 Ohio St. 155, 203 N.E.2d 241 (1964).

22. 131 Ohio St. 166, 2 N.E.2d 490 (1936).

23. City of Cincinnati v. Alexander, 54 Ohio St. 2d 248, 257 n.6, 375 N.E.2d 1241, 1246 n.6 (1978).

24. The supremacy clause states that:

> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

U.S. CONST. art. VI, § 2.

25. 54 Ohio St. 2d 248, 257 n.6, 375 N.E.2d 1241, 1246 n.6 (1978).

26. Oregon v. Haas, 420 U.S. 714, 719 (1975) (emphasis in original).

27. *Id.*

purports to rely on both the federal and state exclusionary rules, it is crucial to analyze further the constitutional basis of the decision in order to comprehend its ramifications.

B. Burkholder's *Application of the Exclusionary Rule*

The facts of *Burkholder* indicate that the police acted under the authority of an invalid search warrant when they seized over one hundred items of stolen property found at the defendant's residence.[28] The warrant was invalid because it failed to recite facts sufficient to establish probable cause. Since the warrant was invalid under both the state and federal constitutions, the trial court appropriately granted the defendant's motion to suppress the evidence at trial.[29]

At the time of his arrest, defendant Burkholder was on probation under the terms of a suspended sentence for a prior offense. After the evidence was suppressed at trial, the state attempted to enter the illegally seized evidence in a probation revocation proceeding against the defendant. The trial court admitted the evidence at this proceeding on the grounds that the exclusionary rule does not apply in probation revocation proceedings.[30] Consequently, the defendant's original sentence for the prior offense was imposed, and he was imprisoned.[31]

The court of appeals reversed the trial court and certified the case to the Ohio Supreme Court to resolve a conflict between this decision and a contrary decision by another intermediate state court.[32] The Ohio Supreme Court affirmed the court of appeals and specifically held as follows:

> While the procedural due process requirements in a probation revocation proceeding are not as extensive as those found in a criminal trial, the substantive constitutional right against unreasonable searches and seizures embodied in the Fourth Amendment to the United States Constitution and Section 14, Article I of the Ohio Constitution, must also apply to a probation revocation proceeding.[33]

Thus, the Ohio Supreme Court held that under both federal and state constitutional guarantees, illegally seized evidence must be excluded from probation revocation proceedings.

This holding is not unprecedented, but it is clearly the minority view. Of the eighteen other states that have considered the issue, fifteen have held that the federal exclusionary rule does not apply in probation revocation proceedings.[34] Five of the

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28. 12 Ohio St. 3d 205, 205, 466 N.E.2d 176, 177 (1984).
29. *Id.*
30. *Id.*
31. *Id.*
32. *Id.* at 205-06, 466 N.E.2d at 177.
33. *Id.* at 206, 466 N.E.2d at 178.
34. *See* 77 A.L.R.3d 636, 641 (1977 & Supp. 1985). *See also* State v. Lombardo, 306 N.C. 594, 602-04, 295 S.E.2d 399, 405 (1982). The following states have held that the federal exclusionary rule does not apply in probation revocation proceedings:
Ariz.—State v. Towle, 125 Ariz. 397, 609 P.2d 1097 (Ct. App. 1980).
Ark.—Harris v. State, 606 S.W.2d 93 (Ark. App. 1980).
Cal.—People v. Rafter, 41 Cal. App. 3d 557, 116 Cal. Rptr. 281 (1974).
Colo.—People v. Wilkerson, 189 Colo. 448, 541 P.2d 896 (1975).

seven federal circuit courts of appeals that have considered this issue have agreed with the majority of the states.[35] Most of these courts have held that a probation revocation proceeding is not part of a criminal prosecution and that, as Justice Holmes noted in his dissent in *Burkholder*, a prospective probationer "is not entitled to all of the constitutional guarantees available to one who stands charged with a criminal offense."[36]

While full consideration of the fourth amendment is beyond the scope of this Comment, one should note that two of the cases relied upon by the Ohio Supreme Court in *Burkholder* were overruled, *prior* to that decision, on the grounds that the fourth amendment does not require the exclusion of evidence at such proceedings.[37] Furthermore, another case cited by the Ohio Supreme Court, *Ray v. State*,[38] clearly recognizes that the fourth amendment does not require application of the exclusionary rule in such proceedings.[39] Thus, *Ray*'s conclusion about the federal exclusionary rule is in direct conflict with the court's conclusion in *Burkholder*. The internal inconsistencies within *Burkholder* only exacerbate the problems created by the court's reliance on both constitutions.

By denying certiorari in *Burkholder*,[40] the United States Supreme Court followed its pattern of refusing to consider the fourth amendment's application to

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Fla.—Croteau v. State, 334 So. 2d 577 (Fla. 1976).
Ill.—People v. Watson, 69 Ill. App. 3d 497, 387 N.E.2d 849 (1979).
Ind.—Dulin v. State, 169 Ind. App. 211, 346 N.E.2d 746 (1976).
Me.—State v. Caron, 334 A.2d 495 (Me. 1975).
Mont.—State v. Thorsness, 165 Mont. 321, 528 P.2d 692 (1974).
N.H.—Stone v. Shea, 113 N.H. 174, 304 A.2d 647 (1973).
N.C.—State v. Lombardo, 306 N.C. 594, 295 S.E.2d 399 (1982).
Or.—State v. Nettles, 287 Or. 131, 597 P.2d 1243 (1979).
Pa.—Commonwealth v. Davis, 234 Pa. Super. 31, 336 A.2d 616 (1975).
R.I.—State v. Spratt, 120 R.I. 192, 386 A.2d 1094 (1978).
Wash.—State v. Proctor, 16 Wash. App. 865, 559 P.2d 1363 (1977).

Only three states have held that the federal exclusionary rule is applicable in such proceedings:

Ga.—Amiss v. State, 135 Ga. App. 784, 219 S.E.2d 28 (1975).
Okla.—Michaud v. State, 505 P.2d 1399 (Okla. Crim. App. 1973).
Tex.—Moore v. State, 562 S.W.2d 484 (Tex. Crim. App. 1978).

35. *See* 30 A.L.R. Fed. 824, 829. The following federal circuit courts of appeals have held that the federal exclusionary rule does not apply in probation revocation proceedings:

3d Cir.—United States v. Bazzano, 712 F.2d 826 (3d Cir. 1983), *cert. denied, sub. nom.* Mollica v. United States, 465 U.S. 1078 (1984).
5th Cir.—United States v. Brown, 488 F.2d 94 (5th Cir. 1973).
6th Cir.—United States v. Farmer, 512 F.2d 160 (6th Cir. 1975), *cert. denied*, 423 U.S. 987 (1975).
7th Cir.—United States v. Hill, 447 F.2d 817 (7th Cir. 1971).
8th Cir.—United States v. Frederickson, 581 F.2d 711 (8th Cir. 1978).
9th Cir.—United States v. Vandemark, 522 F.2d 1019 (9th Cir. 1975).

Two circuits have held that the exclusionary rule applies in such proceedings:

2d Cir.—United States v. Rea, 678 F.2d 382 (2d Cir. 1982).
4th Cir.—United States v. Workman, 585 F.2d 1205 (4th Cir. 1978).

36. 12 Ohio St. 3d 205, 208, 466 N.E.2d 176, 179 (1984) (Holmes, J., dissenting); *see also* United States v. Brown, 488 F.2d 94 (5th Cir. 1973).

37. *See* State v. Alfaro, 127 Ariz. 578, 623 P.2d 8 (1980) (overruling State v. Shirley, 117 Ariz. 105, 570 P.2d 1278 (Ct. App. 1977)); State v. Lombardo, 306 N.C. 594, 295 S.E.2d 399 (1982) (overruling State v. McMilliam, 243 N.C. 775, 92 S.E.2d 205 (1956)). Because these cases were decided two years before *Burkholder*, there was no reason for the Ohio Supreme Court to cite these cases as precedent.

38. 387 So. 2d 995 (Fla. App. 1980), *petition for review denied*, 394 So. 2d 1153 (Fla. 1981).

39. *Id.* at 996; *see also* Croteau v. State, 334 So. 2d 577 (Fla. 1976).

40. 105 S. Ct. 545 (1984).

probation revocation proceedings.[41] Because denial of certiorari is not a decision on the merits, it remains an open question whether the fourth amendment requires the exclusion of evidence at probation revocation proceedings. Under *Burkholder*, however, it is not clear whether the court's reliance on the state constitution expands a probationer's right beyond the scope of the fourth amendment.

III. Reliance on State Constitutional Guarantees to Expand Individual Liberties

A. *The Current Trend Towards Reliance on State Constitutions*

As noted above, a state remains free to expand its own constitutional protections and "to impose safeguards and protections that exceed those required by the federal Constitution."[42] Florida adopted this approach in *State v. Dodd*[43] and held that although the federal exclusionary rule is not applicable,[44] "the Florida constitutional exclusionary rule . . . is applicable in probation revocation proceedings."[45] In this manner, Florida reached beyond the limits of the fourth amendment to expand individual liberties. Such explicit use of state constitutions to go beyond federal constitutional guarantees has received great attention in recent years.[46]

Heralded as the emergence of a "new judicial federalism,"[47] the recent trend toward reliance on state constitutional guarantees has been attributed to the "[s]tagnation and decline in the protection of constitutional rights by the Supreme Court . . . ."[48] Justice Brennan recognized that these state constitutional decisions may reflect "a trend in recent opinions of the United States Supreme Court to pull back from, or at least suspend for the time being, the enforcement . . . of the federal Bill of Rights and the restraints of the due process [clause] . . . ."[49]

A good example of this retrenchment is *South Dakota v. Opperman*,[50] in which the Supreme Court held that the fourth amendment does not prohibit the warrantless, noninvestigatory inventory search of an impounded vehicle. On remand, the state court held that while the search did not violate the fourth amendment, it did violate

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41. *See, e.g.*, United States v. Farmer, 512 F.2d 160 (6th Cir. 1975), *cert. denied*, 423 U.S. 987 (1975); United States v. Rushlow, 385 F. Supp. 795 (S.D. Cal. 1974), *aff'd*, 541 F.2d 287 (9th Cir. 1976), *cert. denied*, 429 U.S. 984 (1976).

42. *Developments in the Law—The Interpretation of State Constitutional Rights*, 95 Harv. L. Rev. 1324, 1368 (1982) [hereinafter cited as *State Constitutional Rights*].

43. 419 So. 2d 333 (Fla. 1982). *See* Ray v. State, 387 So. 2d 995 (Fla. App. 1980); *see also supra* notes 38–39 and accompanying text. *Dodd* adopted the analysis of *Ray* prior to *Burkholder*. Thus, it would have been more appropriate for the Ohio Supreme Court to cite to this decision by the Florida Supreme Court, rather than to a decision by a lower appellate court of the same state.

44. *See* Croteau v. State, 334 So. 2d 577 (Fla. 1976).

45. 419 So. 2d 333, 335 (Fla. 1982).

46. *See, e.g.*, Collins, *Reliance on State Constitutions—Away from a Reactionary Approach*, 9 Hastings Const. L.Q. 201 (1981); Howard, *State Courts and Constitutional Rights in the Day of the Burger Court*, 62 Va. L. Rev. 873 (1976); Linde, *First Things First: Rediscovering the States' Bill of Rights*, 9 U. Balt. L. Rev. 379 (1980). For a listing of other sources, see Tarr, *Bibliographical Essay*, in State Supreme Courts: Policymakers in the Federal System 206–08 (1982).

47. Porter & Tarr, *Introduction*, in State Supreme Courts: Policymakers in the Federal System xxii (1982).

48. *State Constitutional Rights, supra* note 42, at 1331.

49. Brennan, *State Constitutions and the Protection of Individual Rights*, 90 Harv. L. Rev. 489, 495 (1977).

50. 428 U.S. 364 (1976).

the state constitution.[51] Thus, evidence that would have been admissible in a federal prosecution was not admissible in a state proceeding. *Opperman* exemplifies the process of "retroactive incorporation"[52] in which a "state court adopts as a matter of state constitutional law its own earlier federal constitutional interpretation."[53] The result is an expansion of individual rights under the state constitution.

Emergence of state courts as the new protectors of individual liberties has completely reversed the predominant situation of the Warren Court era in which federal courts championed the protection and expansion of individual liberties. The former relationship between state and federal courts has been described as follows:

> The federal judiciary, tutored under the liberal activism of the Warren Court, became the refuge for the individual, especially minorities and politically powerless groups within society. State courts, reflecting traditional patterns of dominance and dependence, were considered to be insensitive to the growing demand for a just and more equitable social order. The Bill of Rights became the instrument by which the Court sought to check state governmental usurpations and advance social and political egalitarianism.[54]

The new activism of state courts has altered this relationship between the two judicial systems by shifting the focus away from the federal constitution.

It is important to recognize that expansion of state constitutional guarantees will also create a shift in the advantage of "forum shopping." An individual who has the opportunity to choose between a state and federal forum may thereby have the advantage of "constitution shopping."[55] If the state courts have expanded individual liberties, the state forum is more likely to be favorable to the plaintiff asserting an infringement of an individual liberty because "[f]ederal courts are not obliged to vindicate state constitutional provisions which confer greater protection than their federal counterparts."[56] As one commentator has noted:

> The [Supreme] Court does *not* impose upon the lower federal courts a duty to enforce *all* state rules governing state officers. If state law condemns a given act, while under the Supreme Court interpretation the fourteenth amendment has not been violated, a duty to help enforce that state policy never arises.[57]

As a result of this policy, the state forum may be considered more advantageous. Once again, the new federalism has resulted in a reversal of old roles: state courts are emerging as the most popular forum in which to bring civil liberties and defendants' rights suits.[58] This trend is strongly exemplified in the decisions of state courts in

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51. State v. Opperman, 247 N.W.2d 673 (S.D. 1976).

52. *State Constitutional Rights, supra* note 42, at 1389.

53. *Id.*

54. Welsh, *Whose Federalism?—The Burger Court's Treatment of State Civil Liberties Judgments*, 10 HASTINGS CONST. L.Q. 819, 826 (1983).

55. Deukmejian & Thompson, *All Sail and No Anchor—Judicial Review Under the California Constitution*, 6 HASTINGS CONST. L.Q. 975, 989 (1979).

56. *Id.* at 980.

57. Berman & Oberst, *Admissibility of Evidence Obtained by an Unconstitutional Search and Seizure—Federal Problems*, 55 NW. U.L. REV. 525, 546 (1960).

58. *See generally* STATE SUPREME COURTS: POLICYMAKERS IN THE FEDERAL SYSTEM (M. Porter & G. Tarr eds. 1982).

California, Michigan, New Jersey, and Oregon, where reliance on state constitutional grounds has become increasingly commonplace.[59]

B. *Limitations on the Current Trend*

A state court's expansion of individual liberties is valid only under state law. This policy is closely related to the basis of federalism: each state is completely free to interpret its own constitution and laws. Thus, the Supreme Court has consistently recognized that it has no jurisdiction over cases decided on an "independent and adequate state ground."[60] *Herb v. Pitcairn*[61] is often cited to support this doctrine and explain the Supreme Court's position:

> Our only power over state judgments is to correct them to the extent that they incorrectly adjudge federal rights. And our power is to correct wrong judgments, not to revise opinions. We are not permitted to render an advisory opinion, and if the same judgment would be rendered by the state court after we corrected its views of federal laws, our review could amount to nothing more than an advisory opinion.[62]

While this autonomy doctrine is clearly recognized by the Supreme Court, the definitions of independent and adequate state grounds have remained unclear.[63] In *Michigan v. Long*,[64] the Court recognized that it lacked a consistent approach to resolution of this problem.[65] Consequently, the Court adopted an unprecedented presumption of jurisdiction in the absence of a "plain statement"[66] of adequate and independent state grounds. Thus, the Court held,

> [w]hen, as in this case, a state court decision fairly appears to rest primarily on federal law, or to be interwoven with the federal law, and when the adequacy and independence of any possible state law ground is not clear from the face of the opinion, [the Court] will accept as the most reasonable explanation that the state court decided the case the way it did because it believed that federal law required it to do so.[67]

Ohio v. Johnson[68] is a good example of the *Long* presumption in action. The Court reviewed an Ohio Supreme Court decision which was based on both the double jeopardy clause of the fifth amendment to the United States Constitution[69] and the state's double jeopardy prohibition under section 10, article I of the Ohio Constitu-

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59. For an analysis of Oregon's reliance on state constitutional grounds, see Linde, *supra* note 46. For overviews of state constitutional developments in California, Michigan, and New Jersey, see Howard, *supra* note 46; *State Constitutional Rights*, *supra* note 42.

60. Jankovich v. Indiana Toll Rd. Comm'n, 379 U.S. 487, 489 (1965); *see also* Fox Film Corp. v. Muller, 296 U.S. 207, 210 (1935).

61. 324 U.S. 117 (1945).

62. *Id.* at 125–26.

63. *See, e.g.*, South Dakota v. Neville, 459 U.S. 553 (1983); Oregon v. Kennedy, 456 U.S. 667 (1982); California v. Krivda, 409 U.S. 33 (1972); Minnesota v. National Tea Co., 309 U.S. 551 (1940).

64. 463 U.S. 1032 (1983).

65. *Id.* at 1038.

66. *Id.* at 1041.

67. *Id.* at 1041–42.

68. 467 U.S. 493 (1984); *see also* Oliver v. United States, 466 U.S. 170, 175 n.5 (1984); Three Affiliated Tribes v. Wold Eng'g, 467 U.S. 138, 152–58 (1984).

69. U.S. CONST. amend. V; *see also* Benton v. Maryland, 395 U.S. 784, 794 (1969) (applied the double jeopardy clause to the states through the fourteenth amendment).

tion.[70] Despite specific references to the state's double jeopardy clause, and to the state legislature's interpretations of that clause,[71] the Supreme Court held that "failure to indicate *clearly* that state double jeopardy protection was being invoked,"[72] coupled with references to decisions under the fifth amendment, indicated that this decision was based on the fifth amendment.[73] As noted by one commentator, "Apparently nothing less than an express and unequivocal disclaimer of any reliance on federal precedents will guarantee the 'nonreviewability' of state court decisions."[74]

Thus, the *Long* presumption can act as a limitation on this new trend of reliance on state constitutions, especially if the state court adopts the "dual reliance" approach[75] by invoking both the federal and state constitutions to support its decision. Dual reliance was once thought to block federal judicial review, by invoking the state constitution, while at the same time reinforcing the state court, by invoking the federal constitution;[76] this theory is no longer valid under *Long*. Only a plain and unequivocal statement of reliance on state law will block federal review. Furthermore, *Johnson* indicates that reliance upon any federal precedent may cause the Court to refuse to recognize the state grounds as completely independent.

IV. Ohio's Reliance on Its Own Constitution

A. *The General Trend in Ohio*

Unlike the courts of California, New Jersey, Michigan, and Oregon, the Ohio Supreme Court has not been a leader in the new federalism trend. Professors Mary Porter and G. Alan Tarr have concluded that the Ohio Supreme Court has adopted an approach directed toward maintaining the status quo and following the leadership of the United States Supreme Court.[77] *Burkholder* is arguably a reversal of this unimaginative approach. However, the ambiguities of *Burkholder* render any definite conclusions about its ramifications highly inadvisable.

In three separate cases prior to *Burkholder*, the Ohio Supreme Court retreated from an expansion of individual liberties on remand and adopted the position of the United States Supreme Court in upholding the government's action against the individual. In *Forest City Enterprises v. Eastlake*,[78] the Ohio Supreme Court on remand refused to invoke state law to resolve a question on the use of referenda. This decision ignored the United States Supreme Court's direct reference to the availability

70. Ohio Const. art. I, § 10.
71. State v. Johnson, 6 Ohio St. 3d 420, 422, 453 N.E.2d 595, 598 (1983).
72. 467 U.S. 493, 498 n.7 (1984) (emphasis added).
73. *Id.*
74. Welsh, *supra* note 53, at 850.
75. Deukmejian & Thompson, *supra* note 55, at 996.
76. *See id.* at 997.
77. Porter & Tarr, *The New Judicial Federalism and the Ohio Supreme Court: Anatomy of a Failure*, 45 Ohio St. L.J. 143, 144 (1984).
78. 41 Ohio St. 2d 187, 324 N.E.2d 740 (1975), *rev'd*, 426 U.S. 668 (1976), *on remand*, 48 Ohio St. 2d 47, 356 N.E.2d 499 (1976) (per curiam).

of state law.[79] Four years later, the United States Supreme Court reversed *State v. Roberts*,[80] in which the Ohio Supreme Court had originally held that the defendant's sixth amendment right of confrontation was violated at trial by the admission of testimony taken at the preliminary hearing from a witness not available at trial.[81] *State v. Madison*[82] followed *Roberts*. In *Madison*, the Ohio Supreme Court refused to extend Ohio constitutional law beyond the United States Supreme Court's decision that the sixth amendment does not require exclusion of this type of evidence. *Madison* adopted this analysis despite a strong dissent that argued for increased protection under the state constitution.[83] In another case, *Zacchini v. Scripps-Howard Broadcasting Co.*,[84] the Ohio Supreme Court refused a direct invitation by the United States Supreme Court to recognize a special privilege for the press as a matter of state law beyond the protection provided by the first amendment.[85]

All of these cases caused Professors Porter and Tarr to conclude that the new federalism has not been adopted by the Ohio Supreme Court; this conclusion was supported by the court's failure to rely on the state constitution, even when invited to do so by the United States Supreme Court.[86] There is, however, one Ohio case that seemed to break with this acquiescent tradition. Significantly, this anomalous case, *State v. Gallagher*,[87] was specifically mentioned in *Burkholder*,[88] while the cases discussed above, in which the Ohio Supreme Court declined to expand individual liberties beyond the scope of the protection offered by the federal constitution, were not mentioned in *Burkholder*.

Gallagher dealt with the admissibility of statements given by the defendant to his parole officer in the absence of proper *Miranda*[89] warnings. The Ohio Supreme Court held that the statements were inadmissible because they were given in violation of the defendant's privilege against self-incrimination as guaranteed by both the federal[90] and state constitutions.[91] On appeal, the United States Supreme Court held that it could not "be certain that the Ohio court did not construe its constitutional provision to be identical to that contained in the Fifth Amendment and thus render judgment simultaneously under both state and federal law."[92] Therefore, the United States Supreme Court remanded to permit the Ohio Supreme Court to explain whether its decision relied solely on federal law.

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79. *See* 426 U.S. 668 (1976).
80. 55 Ohio St. 2d 191, 378 N.E.2d 492 (1978), *rev'd*, 448 U.S. 56 (1980).
81. *Id.*
82. 64 Ohio St. 2d 322, 415 N.E.2d 272 (1980).
83. *Id.* at 332–34, 415 N.E.2d at 278–79 (P. Brown, J., dissenting).
84. 54 Ohio St. 2d 286, 376 N.E.2d 582 (1978) (per curiam).
85. *See* 433 U.S. 562 (1977), *rev'g* 47 Ohio St. 2d 224, 351 N.E.2d 454 (1976).
86. *See* Porter & Tarr, *supra* note 77, at 150–55.
87. 38 Ohio St. 2d 291, 313 N.E.2d 396 (1974), *vacated*, 425 U.S. 257 (1976), *on remand*, 46 Ohio St. 2d 225, 348 N.E.2d 336 (1976) (per curiam).
88. 12 Ohio St. 3d 205, 207, 466 N.E.2d 176, 178–79 (1984).
89. Miranda v. Arizona, 384 U.S. 436 (1966).
90. U.S. CONST. amend. V.
91. OHIO CONST. art. I, § 10.
92. 425 U.S. 257, 259 (1976).

On remand, the Ohio Supreme Court held that because its original decision was based on both constitutions, the court was "independently constrained to the result [it] reached by the Ohio Constitution."[93] While this decision precluded federal judicial review,[94] the Ohio Supreme Court also stated on remand that the federal constitution required the same result.[95] Thus, the Ohio Supreme Court did not profess to expand the state guarantee beyond the scope of the fifth amendment. The court's reliance on both constitutions may have been an attempt to maintain the status quo by remaining acquiescent to federal constitutional law. However, at least arguably, the court did take an independent stand under the state constitution; reference to the federal constitution may have been merely superfluous reinforcement of the court's expansion of individual rights under the state constitution. It is, however, unclear why the Ohio Supreme Court originally refused to take the initiative and explicitly state its independent reliance on state grounds.

B. Burkholder's *Reliance on the State Constitution*

As noted above, *Burkholder* referred specifically to *Gallagher* for the proposition that "a probationer, like the parolee in *Gallagher*, must be afforded the right to assert his or her constitutional privileges."[96] The problem with this statement is that it remains unclear whether the *Burkholder* court was referring to state constitutional privileges, federal constitutional privileges, or both. Given the opinion's prior reference to both constitutions, the logical conclusion is that this oblique reference is also to both constitutions. The court may also have been signaling, by citing *Gallagher*, that the state ground was sufficiently independent to support its decision. However, this interpretation is far from being unimpeachable given the opinion's vague reference to *Gallagher*.

The court in *Burkholder* went beyond the simple dual reliance of *Gallagher* when it unequivocally stated that "pursuant to Section 14, Article I of the Ohio Constitution, evidence obtained through an unreasonable or unlawful search and seizure is inadmissible in a probation revocation proceeding."[97] This specific reference was set apart from the court's analysis under the fourth amendment and indicates that the court did specifically intend to rely on the state constitution for its decision. Perhaps this unequivocal statement is the Ohio Supreme Court's response to the *Long* presumption of reviewability; the United States Supreme Court's denial of certiorari may indeed indicate that this clear statement of reliance on the state constitution precluded review by the Supreme Court because it viewed the decision as resting upon independent and adequate state grounds.[98] However, one should remember that denial of certiorari is not an adjudication on the merits. The United

93. 46 Ohio St. 2d 225, 228, 348 N.E.2d 336, 338 (1976) (per curiam).

94. *See supra* notes 60–62 and accompanying text for a discussion of the doctrine barring review of state cases relying on independent and adequate state grounds.

95. 46 Ohio St. 2d 225, 228, 348 N.E.2d 336, 338 (1976) (per curiam).

96. 12 Ohio St. 3d 205, 207, 466 N.E.2d 176, 179 (1984).

97. *Id.* at 206, 466 N.E.2d at 178.

98. *See supra* notes 60–62 and accompanying text.

States Supreme Court may not have even considered the jurisdictional issue when it refused to review this case. Therefore, it remains an open question whether *Burkholder* relied on independent and adequate state grounds.[99]

If *Burkholder* does not rely on an independent state ground, then a future United States Supreme Court decision denying applicability of the federal exclusionary rule in probation revocation proceedings would raise questions as to the continued validity of *Burkholder*. If, however, *Burkholder* is based squarely on state law, then the state exclusionary rule would apply regardless of the applicability of the federal exclusionary rule.[100] The opinion itself offers little if any guidance as to the intent of the Ohio Supreme Court. As in *Gallagher*, the court did not explicitly profess to expand the individual's rights beyond the protection of the fourth amendment. On remand, however, the *Gallagher* court held that its interpretation of the state constitution was in fact independent of its interpretation of the federal constitution. The problems of *Gallagher*'s ambiguities, therefore, have reemerged in *Burkholder*; it remains uncertain whether the court intended to expand a probationer's rights beyond those that might be available under the fourth amendment.

Burkholder's unequivocal reference to the state constitution is bolstered by references to the guarantees of both constitutions. As noted above, dual reliance complicates the analysis and may defeat even a seemingly plain statement of state grounds for the decision. Furthermore, *Burkholder* cited precedent that relied only on the federal constitution and fourth amendment analysis.[101] While two of the cases relied on by the Ohio Supreme Court did mention state constitutional grounds,[102] only *Ray* specifically relied on the state constitution in the absence of fourth amendment protection.[103] Although citation to *Ray* may support a similar view in Ohio, *Burkholder* never explicitly stated that the court intended to provide such protection in the absence of fourth amendment protection. Thus, one can only speculate that *Burkholder* represents an intentional example of the new judicial federalism.

If *Burkholder* does represent the Ohio Supreme Court's attempt to expand a probationer's rights under the state constitution, then this may signal a change in the court's prior acquiescent approach to individual liberties.[104] If so, *Burkholder* may be heralded as the first case to clearly recognize the new judicial federalism in Ohio. At the very least, *Burkholder* may indicate that the Ohio Supreme Court recognized the mandate of *Long* and attempted to make a plain statement of reliance on state constitutional grounds. Unfortunately, the court's intentions remain unclear because of *Burkholder*'s references to both constitutions and to federal constitutional analysis.

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99. It should be noted that at least one justice has described *Burkholder* as "explicitly based on independent state grounds." California v. Carney, 105 S. Ct. 2066, 2072 n.4 (1985) (Stevens, J., dissenting).

100. The court's explicit exclusion of evidence obtained through an unreasonable or unlawful search and seizure seems to exclude evidence that would be admissible under the *Lindway* standard of admissibility. If so, *Burkholder* might also signal an expansion of the state's exclusionary rule. However, the opinion provides no further guidance on this point.

101. *See* Adams v. State, 153 Ga. App. 41, 264 S.E.2d 532 (1980); Giles v. State, 149 Ga. App. 263, 254 S.E.2d 154 (1979); Amiss v. State, 135 Ga. App. 784, 219 S.E.2d 28 (1975); Michaud v. State, 505 P.2d 1399 (Okla. Crim. App. 1973).

102. *See* Ray v. State, 387 So. 2d 995 (Fla. App. 1980); Moore v. State, 562 S.W.2d 484 (Tex. Crim. App. 1973).

103. 387 So. 2d 995, 996–97 (Fla. App. 1980).

104. *See supra* notes 77–86 and accompanying text.

It may be premature, therefore, to claim that *Burkholder* signals a reversal of Ohio's acquiescent approach to protection of individual rights.

V. Conclusion

While *State v. Burkholder* held that illegally seized evidence is inadmissible in a probation revocation proceeding, it remains unclear whether the Ohio Supreme Court intended to expand a probationer's rights beyond those that might be guaranteed by the fourth amendment. By use of the dual reliance technique, the court tied its holding to both federal and constitutional guarantees against unreasonable searches and seizures. This tactic complicates the analysis of *Burkholder* because it conflicts with the court's unequivocal reference to state constitutional grounds. Thus, it remains unclear whether *Burkholder* signals the Ohio Supreme Court's intention to expand probationers' rights under the state constitution or to maintain the status quo through adherence to the limits of the federal constitution. Because of this ambiguity, *Burkholder* will remain uncertain if the United States Supreme Court eventually holds that the federal exclusionary rule is inapplicable in probation revocation proceedings.

If the court actually intended to rely on the state constitution regardless of the limits of the fourth amendment, an explicit statement to that effect would resolve the questions raised in this Comment. Furthermore, if *Burkholder* marks the emergence of the new judicial federalism in Ohio, then the court would be wise to recognize the unanswered questions raised by *Burkholder* and to be more explicit in future cases that seek to expand individual liberties under the Ohio Constitution.

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